Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

BRIAN VICTOR MYRLAND AND
MARK ROBERT NORLANDER,

Petitioners,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF MINNESOTA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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40 pp

QUESTIONS PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment is violated when a criminal statute shifts the burden of production of evidence to the defendant on an essential element of the crime effectively resulting in a directed verdict on the element unless the defendant presents the threshold prima facie amount of evidence necessary to overcome the statutory presumption of guilt.

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Petitioners, Brian Victor Myrland and Mark Robert Norlander, petition for a Writ of Certiorari to review the judgment of the Minnesota Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Minnesota Court of Appeals finding that the district court erred in dismissing charges against Petitioners is published at State v. Myrland, 644 N.W.2d 847 (Minn. Ct. App. 2002) and is attached. The district court orders dismissing the complaints and the order of the Minnesota Supreme Court denying Petitioners' Petition for Review are unpublished and are attached.

JURISDICTION

The district court, in identical separate orders filed December 18, 2001, dismissed complaints against both Petitioners. The state filed appeals with the Minnesota Court of Appeals, Petitioners cross-appealed and the cases were consolidated. On June 4, 2002 the court of appeals reversed the district court. A timely Petition for Review was filed with the Minnesota Supreme Court, and was denied on August 6, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution provides in pertinent part that no State shall 'deprive any person of life, liberty, or property, without due process of law...' U.S. CONST. Amend. XIV, § 1.

STATUTES

Minnesota Statute § 617.246, Subdivision 1 (f):

(f) "Pornographic work" means:

(1) an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor; or

(2) any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means that:

(i) uses a minor to depict actual or simulated sexual conduct;

(ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or

(iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.

For the purposes of this paragraph, an identifiable minor is a person who was a minor at the time the depiction was created or altered, whose image is used to create the visual depiction.

Minnesota Statute § 617.246, Subdivision 1 (b):

(b) "Minor" means any person under the age of 18.

Minnesota Statute § 617.247, Subdivision 4:

Subd. 4. Possession prohibited. (a) A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or

optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than five years and a fine of not more than $5,000 for a first offense and for not more than ten years and a fine of not more than $10,000 for a second or subsequent offense.

Minnesota Statute § 617.247, Subdivision 8:

> **Subd. 8. Affirmative defense.** It shall be an affirmative defense to a charge of violating this section that the pornographic work was produced using only persons who were 18 years or older.

See Minn.Stat. § 617.247 Subd. 2 (a) adopting the definition of "pornographic work" in § 617.246 for § 617.247.

STATEMENT

This case raises the question of whether a criminal statute may constitutionally shift the burden of production of evidence to the defendant on an essential element of the crime, effectively directing a verdict on the element unless the accused presents a prima facie case showing that the element is at issue.

Minn.Stat. § 617.247 makes it a felony to possess pictorial representations of minors engaged in sexual conduct. The statute makes the question of the age of the actors both an element of the crime and an affirmative defense. The statute, as construed by the Minnesota Court of Appeals, does not require the state to prove the person portrayed is a minor unless the defendant first provides evidence that the person portrayed is an adult. When the defendant is unable to provide this evidence the state prevails on the essential element of age without producing any evidence.

In unrelated incidents petitioners were charged with possession of pictorial representations of minors pursuant to Minn.Stat. § 617.247. Petitioners brought pre-trial motions to dismiss on the grounds that the statute violates the Fourteenth Amendment Due Process Clause of the United States Constitution by impermissibly shifting the burden of proof to the defendant on an essential element of the crime. (See District Court Orders, App. A-12 and A-17.) Finding that the statute unconstitutionally shifts the burden, the district court granted both motions and dismissed the complaints in separate identical orders.

The State appealed and the Minnesota Court of Appeals consolidated the cases. At the court of appeals petitioners again asserted that the statute violates the Fourteenth Amendment Due Process Clause. While the Minnesota Court of Appeals agreed with the district court that the statute shifts the burden on an essential element, the appeals court reversed the district court, reasoning that it is permissible to shift the burden to the defendant because the statute shifts the burden of production and not the greater burden of persuasion. See State v. Myrland, 644 N.W.2d 847, 851 (Minn. Ct. App. 2002) (App. A-3, A-8).

At issue in this case is Subdivision 8 that states: "Affirmative defense. It shall be an affirmative defense to a charge of violating this section that the pornographic work was produced using only persons who were 18 years or older." Minn. Stat. § 617.247, subd. 8 (2001). Under the statute a defendant must present a threshold amount of evidence to establish a prima facie case that the majority age of the actors is a viable defense. The Minnesota Court of Appeals held that the affirmative defense imposes the burden of production regarding the age of the persons in the pornographic work and that petitioners are consequently required to make a prima facie showing that the age of the persons is a disputed issue. Myrland, 644 N.W.2d at 851 (App. A-3, A-8.).

A prima facie case is only made when the party carrying the burden of production has produced that quantum of evidence that suffices for proof of a particular fact until the fact is contradicted by other evidence. It is only when the trial judge determines that the party carrying the burden of production has produced a sufficient amount of evidence to establish a prima facie case that the burden shifts to the other party to contest the fact at issue. If the party carrying the burden of production does not produce that threshold amount of evidence the fact at issue will not be presented to the jury for determination. Thus, if petitioners are unable to present enough evidence to convince the trial judge that the majority age of the actors is a viable defense, there will be no shift of the burden from the defendant to the state to prove that the actors are minors, and no jury determination of the question of age. In effect, a directed verdict is entered against petitioners on the essential element of age. The sole question for this Court is whether the statutory burden shifting and consequent presumption of guilt is constitutional.

Immediate review of the Minnesota Court of Appeals reversal of the District Court's pretrial Order is appropriate under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949), Abney v. United States, 431 U.S. 651 (1977), Helstoski v. Meanor, 442 U.S. 500 (1979), and Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975).

From these cases this Court determined that the Supreme Court has jurisdiction to review a pretrial order when the order:

1) Fully disposes of the issue;

2) The issue disposed of is collateral to the cause of action asserted; and,

3) The decision involved an important right which would be lost if review had to await final judgment.

Abney, 431 U.S. at 659.

Review is proper because all three prongs are met. First, the due process challenge has been fully litigated in the Minnesota courts. This conclusively decides the issue; future proceedings will do nothing to further illuminate this question.

Second, the due process challenge is collateral to the cause of action, as it has nothing to do with the merits of the action, evidentiary questions, or the guilt or innocence of the Petitioners. The Minnesota Court of Appeals Opinion reversed the district court, which held that Petitioners may not be compelled to stand trial in the first place. In Abney this Court held that appellate review of a pretrial order rejecting claims of former jeopardy is appropriate, stating that:

> In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him... Rather he is contesting the very authority of the government to hale him into court to face trial on the charge against him.

Id. at 659. Since the due process issue concerns the facial validity of the statute and whether Petitioners may be compelled to stand trial in the first place, the challenge is collateral to the cause of action.

The third prong is satisfied because the asserted due process right, which would be lost if review had to wait, is the right not be tried in proceedings without the presumption of innocence and carrying the burden of production. By dismissing the complaints, the district court held that Petitioners may not be tried. In Abney this Court held that the right that would be lost if review had to wait is the right not to be tried. Id. at 661. In Cox appellant newspaper sought review of its pretrial First Amendment challenge to a criminal statute which prohibited publishing the names of rape victims. This Court held that, even though appellant

might prevail on the merits at a trial, "if the Georgia Court erroneously upheld the statute, there should be no trial at all." Cox, 420 U.S. at 485. In another case this Court held that pretrial appeal of an order denying a motion to dismiss an indictment under the speech or debate clause satisfies the third prong because the right that would be lost is the right not to be questioned (about certain legislative activities) at a trial. Helstoski at 500. The third part of the test is met in the present case as the asserted due process right is the right not to be tried.

This Court has jurisdiction because all three prongs of the test for review of a pretrial order are satisfied.

REASONS FOR GRANTING THE PETITION

I. Review should be granted because the Minnesota Court of Appeals Opinion is in open conflict with United States Supreme Court precedent

In the foundational case of In re Winship this Court announced that: "[w]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). The due process mandate of Winship has been universally interpreted as requiring the state to bear the burden of production (in addition to the burden of persuasion) on all elements of the crime. This Court has since stated that: "Generally in a criminal case the prosecution bears both the production burden and the persuasion burden." Mullaney v. Wilbur, 421 U.S. 684, 702 n.31 (1975). In another case this Court reiterated that the state must bear the burden of production on the elements of the crime (here the Court refers to the burden of production as "to come forward with some evidence"). The Court stated:

> Definition of a crime's elements may have consequences under state law other than the allocation of the burden of persuasion. For example, the Ohio Supreme Court interpreted [the state statute's affirmative defense of self-defense] to require defendants to come forward with some evidence of affirmative defenses. Defendants do not bear the same burden with respect to the elements of a crime; the State must prove those elements beyond a reasonable doubt *even when the defendant introduces no evidence*.

Engle v. Isaac, 456 U.S. 107, 120 n.20 (1982) (emphasis added).[1]

The Minnesota Court of Appeals opinion is in direct conflict with Winship. In Winship this Court unambiguously held that the state has the burden of proving all of the elements. Winship did not limit its holding to cases where the defendant first makes a prima facie case of his innocence on the elements. If this were so then defendants would be

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[1] In Ashcroft v. Free Speech Coalition, 535 U.S. __, 122 S.Ct. 1389 (2002), this Court struck down provisions of the federal child pornography statute on First Amendment grounds, but expressly noted its concern about that statute's similar burden-shifting affirmative defense. This Court stated that:

> the government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way establishing the identity, or even the existence, of the actors... Failure to establish the defense can lead to a felony conviction.

Id. 122 S.Ct. at 1404-05.

presumed guilty from the beginning and would only receive a jury determination of the element when and if the defendant produced enough evidence to make the prima facie case on the element. The opinion also conflicts with the Court's position expressed in United States v. Gaudin, 515 U.S. 506 (1995), where this Court reiterated that the Due Process Clause "require[s] criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged..." Id. at 510 (quoting Sullivan v. Louisiana, 508 U.S. 275, 277-78 (1993)).

Law Professor Richard Allen has explained how shifting the burden of production to the defendant deprives the defendant of the presumption of innocence and of the right to trial by the jury.

> Imposing the burden of production on the defendant harms him not by affecting a shift in the parties' burden of persuasion, but rather by shifting from the state to the defendant the burden of going forward with the evidence. If the defendant is unable to meet the burden of production, the state is thereby relieved of the duty to present evidence and persuade the jury on an issue relevant to the defendant's culpability.
>
> A significant procedural difference is also present when a litigant is forced to bear a burden of production – the judge, rather than the jury, will determine whether the burden has been met. If a judge decides that the burden of production on an issue has not been satisfied, he will not instruct the jury on that issue. Accordingly, the defendant will not receive a jury determination of the issue because, in effect, the judge has directed a verdict on it. And this is true notwithstanding the hallowed dogma that a directed verdict or a preemptory ruling against the accused in a criminal case, even as to a

single element of the crime, is abhorrent to the criminal law.

Richard Allen, Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices, 94 Harv. L. Rev. 321, 329 (1980).

Clearly Winship and subsequent cases require the state to carry the burden of production on the elements of the crime. Because the court of appeals opinion is in direct conflict with the due process requirements established by this Court review of that opinion should be granted.

II. Review should be granted because the Minnesota Court of Appeals Opinion is contrary to the law in virtually every jurisdiction in the United States

This Court has noted that the Winship due process requirements are adhered to "by virtually all common law jurisdictions." Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). Examples include the Iowa Supreme Court, which held that Winship requires the state to carry the burden of production of evidence on the elements (the court refers to the burden of production as "the burden of going forward"): "In all these cases we must first determine whether the provision under scrutiny is an element of the offense. If it is, the burden of going forward with the evidence as well as the ultimate burden of persuasion is on the prosecution." State v. Gibbs, 239 N.W.2d 866, 867 (Iowa 1976) (citing In Re Winship, 397 U.S. 358). The Michigan Supreme Court also held that the state must carry the burden of production on the elements. People v. Pegenau, 523 N.W.2d 325 (Mich. 1994). The court cited the following language from an earlier case (here the court refers to the burden of production as "the initial burden of proof"):

> Requiring the defendant to bear the initial burden of proof [regarding authorization to possess prescription drugs] is not violative of the constitution because lack of authorization is by

> statute clearly *not an element* of the crime. Unquestionably, as a matter of constitutional law, the people must prove beyond a reasonable doubt every element of the crime charged.

Id. at 332-33 (citing People v. Bailey, 272 N.W.2d 147 (Mich. Ct. App. 1978) and In re Winship) (emphasis added).

The following courts have also held that the state carries the entire burden at all times to prove the elements and that this burden may never be shifted to the defendant: United States v. Thayer, 201 F.3d 214, 222 (3d Cir. 1999) (the government must prove each element of a criminal charge "whether or not the defendant presents evidence contesting the element."); Lopez ex rel. Garcia v. Curry, 583 F.2d 1188, 1192-93 (2d Cir. 1978) ("No matter how persuasive the evidence of guilt may seem to the court, a defendant does not carry the burden of disputing it, nor does his failure to offer evidence on an element of the crime change or satisfy the prosecutor's burden."); Hedrick v. State, 637 So. 2d 834, 837 (Miss. 1994) ("The burden of proving each element of an offense always remains with the prosecution, and never shifts from the State."); Commonwealth v. Wagaman, 627 A.2d 735, 737 (Pa. Super. 1993) ("The never-shifting burden on the Commonwealth is to prove every essential element of the charge."); State v. Brown, 504 So. 2d 639, 640 (La. Ct. App. 1987) ("In a criminal prosecution the defendant has no burden to exonerate himself. He may remain silent and offer nothing in his defense. The state has the entire burden of proving every element of the offense."); Commonwealth v. Burke, 457 N.E.2d 622, 624 (Mass. 1983) ("An element is a fact that must be proved by the prosecution... the Commonwealth has both the burden of producing some evidence and the burden of persuading the trier of fact beyond a reasonable doubt.").

Commentators concur that the state must carry the burden of production on the elements, and that this long-standing principle is adhered to universally:

> It is *everywhere* agreed that the prosecution has the burden of proving each of the various elements of the offense in both burden-of-proof senses: it must, to avoid a directed verdict of acquittal, produce evidence of each element; and it must, to secure a conviction, convince the trier of fact of the existence of each element beyond a reasonable doubt.

Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law, Vol. 1, Sec. 1.8 (a), (b) (1986) (emphasis added).

Because it is universally agreed that the state must carry the burden of production on the elements, the Minnesota Court of Appeals Opinion to the contrary necessitates review by this Court.

III. Review should be granted because the Minnesota Court of Appeals Opinion is erroneous

The Minnesota Court of Appeals Opinion is erroneous because it equates the affirmative defense in Minn. Stat. § 617.247, which shifts the burden on an element, with affirmative defenses that do not shift the burden on an element, but instead shift the burden on a defense which *excuses*, *justifies*, or *negates* an element (such as duress, insanity, heat of passion, or intoxication). The court of appeals has incorrectly cited a series of cases in support of its position that it is constitutional to shift the burden of production to the defendant on an element of the crime. The cases cited by the court of appeals do not hold, as the court of appeals contends, that the burden of production may be shifted on an element of the crime. See Myrland, 644 N.W.2d at 850, (App. A-6, A-7) citing State v. Auchampach, 540 N.W.2d 808, 816 (Minn. 1995), State v. Hage, 595 N.W.2d 200, 204-05 (Minn. 1999), State v. Charlton, 338 N.W.2d 26, 30-31 (Minn. 1983).

In the Auchampach, Hage, Charlton line of cases the respective affirmative defenses did not shift the burden of

production on an element of the crime. The issue in these cases was the determination of which burden (production or persuasion) is shifted by the respective affirmative defense, which offered the defendant an excuse to the crime only after the elements were first proven by the state in both burden of proof senses.[2] In other words, in these cases the state was required to carry both the burden of production and the burden of persuasion on the elements. Once the state proved the elements, the defendant would then have the option, *if* he could satisfy the allocated burden, of raising the affirmative defense, which excused one of the elements. The affirmative defense in Minn. Stat. § 617.247 does not operate in this fashion, as it does not offer an excuse to the already proven crime. Instead, it shifts the burden on the element itself.[3] Because the Minnesota Court of Appeals Opinion was erroneous on such a fundamental issue, this Court should accept the case for review.

IV. Review should be granted because the precedential effect of the Minnesota Court of Appeals Opinion could adversely affect the due process rights of innumerable citizens of the State of Minnesota

The court of appeals has effectively declared that the legislature may shift the initial burden of proof to the

---

[2] Thus, in Charlton, the Court held that, because the proffered affirmative defense of duress tends to negate the element of malicious intent, a defendant could only be required to carry the lesser burden of production. Conversely, a defendant may be required to carry the heavier burden of persuasion on the defense of insanity because proving insanity does not negate malicious intent. State v. Charlton, 338 N.W.2d 26, 30-31 (Minn. 1983).

[3] In its brief and at oral argument, Petitioners argued extensively to the court of appeals that the statute is unconstitutional regardless of whether it shifts the burden of production or of persuasion. Petitioners made the same argument to the district court.

defendant by making an essential element of a crime an affirmative defense. The present law and possible future legislative acts will result in defendants across Minnesota losing the presumption of innocence and requiring them to present evidence sufficient to establish a prima facie case that the element in question is at issue. This violates the rule of Patterson v. New York, 432 U.S. 197 (1977), where this Court stated that "there are constitutional limits beyond which the States may not go" by labeling as affirmative defense at least some elements of the crimes now defined in their statutes. Patterson v. New York, 432 U.S. 197, 210 (1977). "It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." Id.

In some cases defendants will be unable to make the required prima facie showing, effectively resulting in a directed verdict on the element in question. The Minnesota Supreme Court has made it clear that merely *raising* the respective affirmative defense does not entitle the defendant to an instruction on the defense; the defendant must also present enough evidence to make "a sufficient prima facie showing" of the defense. See State v. Brodie, 532 N.W.2d 557 (Minn. 1995) (defendant did not make a sufficient showing of necessity); State v. Vaughn, 361 N.W.2d 54, 57 (Minn. 1985) (defendant did not make a sufficient showing of inducement to show entrapment). Thus, when the affirmative defense is also an element of the crime, defendants will not receive a jury determination on that element whenever the trial judge believes that the defendant has failed to present sufficient evidence to make a prima facie showing in opposition to the element in question. This violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The Minnesota Court of Appeals has given the legislature the green light to shift the burden to the defendant on the elements of a crime. Immediate review by this Court

is necessary to prevent the innumerable due process violations that may consequently occur.

CONCLUSION

Petitioners respectfully request that this Court accept review of this case to protect the rights of the accused in Minnesota who are now required to stand trial carrying the burden of production of evidence without the presumption of innocence. The Minnesota statute violates due process and is unconstitutional on its face and as applied. The orders of the district court dismissing the complaints should be reinstated.

Based upon the foregoing, Petitioners respectfully request that their petition for a writ of certiorari to the Minnesota Court of Appeals be granted.

Respectfully submitted,

_____ Dated: September 5, 2002

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STATE OF MINNESOTA
IN SUPREME COURT
C8-01-2223 and CX-01-2238

OFFICE OF
APPELLATE COURTS
AUG 0 6 2002
FILED

State of Minnesota,

Respondent,

vs.

Brian Victor Myrland and Mark Robert Norlander,

Petitioners.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Brian Victor Myrland and Mark Robert Norlander for further review be, and the same is, denied.

Dated: August 6, 2002

BY THE COURT:

/s

Kathleen A. Blatz
Chief Justice

STATE OF MINNESOTA
IN COURT OF APPEALS
C8-01-2223
CX-01-2238

State of Minnesota,
Appellant,

vs.

Brian Victor Myrland,
Respondent (C8-01-2223),

Mark Robert Norlander,
Respondent (CX-01-2238).

Filed June 4, 2002
Reversed and remanded
Foley, Judge*

Dakota County District Court
File No. K2012646

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Considered and decided by Hanson, Presiding Judge, Klaphake, Judge, and Foley, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

SYLLABUS

Minn. Stat. § 617.247, subd. 8 (2000), which provides that it is an affirmative defense to possession of child pornography that the person in the pornographic work is 18 years of age or older, does not unconstitutionally shift the burden of proof because the burden it imposes on defendants is a burden only of production, not of persuasion.

OPINION

FOLEY, Judge

In these consolidated appeals, the state challenges the dismissal of charges against respondents for possession of child pornography. The state contends that the district court erred in finding that the affirmative defense in Minn. Stat. § 617.247, subd. 8 (2000), unconstitutionally requires defendants to prove the age of the person in the pornographic work. Because we find the statute only imposes on the defendant the burden of production, we reverse and remand.

FACTS

On March 22, 2001, respondent Mark Robert Norlander was charged with possession of pornography involving minors under Minn. Stat. § 617.247, subd. 4 (2000). He moved to dismiss the charge on the constitutional grounds that (1) the affirmative defense in Minn. Stat. § 617.247, subd. 8 (2000), shifts the burden of proof by requiring that he prove the age of the persons in the pornographic work; (2) the statute contains no *mens rea* element; and (3) the statute is overbroad. Several months later, respondent Brian Victor Myrland was charged under the same statute in an unrelated incident. He moved to dismiss for the same reasons.

The district court granted both motions and dismissed the cases in separate orders, finding that the affirmative defense violates respondents' due process rights by requiring them to prove an essential element of the crime, namely, the

age of the persons in the pornographic work. The court denied respondents' motions to dismiss on the other grounds. The state filed separate notices of appeal, respondents cross-appealed, and we consolidated the appeals.[1]

ISSUE

Does the affirmative defense in Minn. Stat. § 617.247, subd. 8 (2000), unconstitutionally shift the burden of proof to the defendant?

ANALYSIS

The relevant statute prohibits knowingly possessing

> a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work.

Minn. Stat. § 617.247, subd. 4 (2000). "Pornographic work" is defined as:

> (1) an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor; or
>
> (2) any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means that:
>
> > (i) uses a minor to depict actual or simulated sexual conduct;

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[1] We do not address the issues raised by respondents because they failed to brief them. *See Rainer v. State*, 566 N.W.2d 692, 694 n.1 (Minn. 1997) (holding that a party waives the issues it appeals if it fails to brief them).

(ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or

(iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.

For the purposes of this paragraph, an identifiable minor is a person who was a minor at the time the depiction was created or altered, whose image is used to create the visual depiction.

Minn. Stat. § 617.246, subd. 1(f) (2000); *see* Minn. Stat. § 617.247, subd. 2(a) (2000) (adopting the definition of "pornographic work" in section 617.246 for section 617.247). A "minor" is a person under the age of 18. Minn. Stat. § 617.246, subd. 1(b) (2000). Finally, the defense at issue provides:

> It shall be an affirmative defense to a charge of violating this section that the pornographic work was produced using only persons who were 18 years or older.

Minn. Stat. § 617.247, subd. 8 (2000).

The state argues the statute is constitutional because it requires the state, not respondents, to prove that the person in the pornographic work is a minor. It contends that the affirmative defense only requires respondents to make a prima facie showing that the age of the person is a disputed issue, at which point the burden shifts back to the state to disprove the defense. Respondents counter that the statute is unconstitutional on its face because it requires them to prove the person is older than 18.

Whether a statute is constitutional is a question of law, which we review de novo. *State v. Grossman, 622* N.W.2d

394, 396 (Minn. 2001). Due process requires that the state prove every element of a crime beyond a reasonable doubt. *Patterson v. New York*, 432 U.S. 197, 204, 97 S. Ct. 2319, 2324 (1977); *State v. Auchampach*, 540 N.W.2d 808, 816 (Minn. 1995). It also prohibits the state from imposing the burden of persuasion on the defendant to disprove or negate an element of the crime. *State v. Hage*, 595 N.W.2d 200, 204 (Minn. 1999). But once the state proves each element of the crime beyond a reasonable doubt, it may impose on the defendant the burden of proving by a preponderance of the evidence that his or her conduct should be excused by some mitigating circumstances or issues. *Id.* at 207 (allowing state to impose burden of persuasion on defendant to prove it was necessary for her to be in control of a vehicle while under the influence of alcohol).

However, if these mitigating circumstances or issues disprove or negate an element of the crime, then "the greatest burden a state may impose upon a defendant is that of shouldering the burden of production." Id. at *205; see State v. Charlton, 338* N.W.2d 26, 30-31 (Minn. 1983) (defendant had only burden of production regarding claim of duress because otherwise he would be forced to disprove or negate his intent to commit robbery where intent was element of crime). A defendant meets this lesser burden by making "a prima facie showing that the proffered defense is an issue in the case," at which point the burden of persuasion reverts to the state to prove beyond a reasonable doubt that the defense does not exist. *Hage, 595* N.W.2d at 205. Therefore, due process is violated if (1) the proffered defense disproves or negates an element of the charged crime, and (2) the defendant has the burden of persuasion with respect to the defense.

It is the duty of courts to interpret statutes as the legislature intended. Minn. Stat. § 645.16 (2004) (instructing courts to interpret laws in accordance with legislative intent). To that end, we first look to the legislature's guidance before employing other interpretative devices. Our state legislature

has at times imposed the burden of persuasion on defendants when raising affirmative defenses. *See* Minn. Stat. § § 609.344, subd. 1(b) (2000) (regarding age in criminal sexual conduct}; 609.205(4} (regarding provocation of animal in second-degree manslaughter}; 169A.46 (regarding drinking and driving}. But at other times the legislature has provided for affirmative defenses without addressing whether the burden of persuasion or production applies. *See* Minn. Stat. § § 609.26, subd. 2 (2000) (regarding deprivation of parental and custodial rights}; 169.09 (regarding Leaving the scene of an accident).

This inconsistent treatment also exists in our appellate court decisions, which at times impose the burden of persuasion for affirmative defenses and other times impose only the burden of production. *See Auchampach,* 540 N.W.2d at 817 n.7 (noting inconsistent treatment}; 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice § 7.1* (2001) (same). Without resolving the dilemma, the Minnesota Supreme Court instructed those encountering the inconsistency to look beyond the classifications and, in the words of Justice Oliver Wendell Holmes, "think things, not words." *Auchampach,* 540 N.W.2d at 817 n.7 (citing *Holmes - Laski Letters: The Correspondence of* MY. *Justice Holmes and Harold J. Laski 1916-1935* 738 (Mark DeWolfe Howe ed., 1953)). Thus the proper approach is to disregard labels such as "affirmative defense" and instead focus on what the defense substantively requires. *See Auchampach, 540* N.W.2d at 817 n.7.

Respondents' contention that the statute, on its face, imposes the burden of persuasion is without merit. To the contrary, nothing in this statute indicates what burden the legislature intended to place on a defendant raising the defense. Therefore, we are left to our rules of interpretation.

> [W]hen confronted with a statute susceptible to multiple interpretations, we adopt the one that stands in harmony with the Constitution, even

> if the alternative construction might otherwise seem a more accurate reflection of legislative intent.

State v. Carroll, 639 N.W.2d 623, 627 (Minn. App. 2002) (quotation omitted); *see* Minn. Stat. § 645.17(3) (2000) ("The legislature does not intend to violate the constitution of the United States or of this state."). In this case, the possible interpretations are either that it imposes a burden of persuasion with respect to an element of the crime, which is unconstitutional, or it imposes a burden of production, which is constitutional. Given this choice, we must adopt the constitutional interpretation and find that the defense imposes merely the lesser burden of production.

Thus, the defense does not violate respondents' due process rights because it does not impose upon them a burden of persuasion regarding an element of the crime. Rather, it merely requires respondents to make a prima facie showing that the age of the persons involved is a disputed issue.[2] As such, the state is never freed of its burden to prove the age of the persons involved and the charges will be dismissed if it fails to meet that burden.

DECISION

Because the affirmative defense in Minn. Stat. § 617.247, subd. 8 (2000), imposes on defendants only the burden of production regarding the age of the persons in the pornographic work, the district court erred in finding the

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[2] Respondents note the United States Supreme Court's concern over a similar affirmative defense provision in the federal child pornography law. *Ashcroft v. Free Speech Coalition*, 122 S. Ct.1389, 1404, U.S. (2002), *aff'g* 198 F.3d 1083 (9th Cir. 1999) ("The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful."). This concern is met here because we find the affirmative defense in Minnesota's law does not impose the burden of proof, but merely the burden of production.

statute unconstitutional and in dismissing the charges against respondents.

Reversed and remanded.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

State of Minnesota, Court File No. K2-01-2646

Plaintiff,

vs. ORDER

Brian Victor Myrland,

Defendant.

The above entitled case came on before the undersigned judge on November 28, 2001 at the Dakota County Judicial Center, Hastings, MN for a contested omnibus hearing.

The State was represented by Kathryn Keena, Assistant Dakota County Attorney. The Defendant was present and represented by Jeffrey Dean, Esq.

Based upon the submissions of the parties, arguments by counsel and the court file the court makes the following:

ORDER

1. The Defendant's motion for dismissal of the complaint is GRANTED.

2. The attached memorandum is incorporated here as part of the court's order.

BY THE COURT:

Dated: 12-14-01 /s

Leslie M. Metzen
Judge of District Court

MEMORANDUM

Defendant has filed a motion to dismiss the complaint alleging that Minn. Stat. §617.247, subd. 4 is unconstitutional. He alleges three bases for the unconstitutionality of the statute. First, he argues that the affirmative defense contained in subd. 8 shifts to defendant the burden of proof on an element of the crime. Second, he alleges the statue contains no *mens rea* element. Third, he alleges the statue violates the First Amendment of the United States Constitution.

These issues will be addressed in reverse order. It is well settled that the First Amendment does not extend to protect the use, possession, or dissemination of child pornography. A statute is presumed to be constitutional and will survive an overbreadth challenge unless its overbreadth is both real and substantial. States have an important and legitimate interest in protecting minor victims of child pornography. The potential harm to minors who engage in creating pornographic images may be psychological, physical, and emotional. States are entitled to great leeway in the regulation of pornographic depictions of children. Minnesota's statute is neither over broad nor violative of the First Amendment.

The defendant also alleges the Minnesota statute does not contain a *mens rea* element. Subd. 4 prohibits a person from possessing a pornographic work, **"knowing or with reason to know its content and character."** The plain language of the statute requires the state to prove that the defendant knew or had reason to know that the image possessed involved a sexual performance involving a minor. The term minor is clearly defined and sexual conduct is also clearly defined. For a pornography statute to be constitutional, some level of scienter as to the minority of a child is required. The scienter element of the Minnesota statute requires the defendant to know or have reason to know that the pornographic work in his possession contains a minor engaged in sexual conduct. The state must prove the *mens rea*

element included in the Minnesota statute and the statute is not unconstitutional on that ground.

Defendant additionally alleges Minn. Stat. §617.247 violates both the federal and state Due Process Clause. Subd. 8 provides, "It shall be an affirmative defense to a charge of violating this section that the pornographic work was produced using only persons who were 18 years or older." The Fourteenth Amendment prohibits shifting the burden of proof for an element of the charged offense to the defendant. State v. Niska, 514 N.W. 2d 260 (Minn. 1994). Due process requires the state prove beyond a reasonable doubt the existence of every element of the crime charged. A defendant's due process rights are violated if the burden to disprove the existence of any element of the crime charged is impermissibly shifted to the defendant. Mullane v. Wilbur, 421 U.S. 684 (1975). There are constitutional limits beyond which the states may not go in allocating burdens of proof by labeling as affirmative defenses at least some elements of the crime that have been defined in their statutes. Patterson v. New York, 432 U.S. 197 (1977). Requiring a defendant to bear the burden of persuasion for an affirmative defense is consistent with due process only when doing so does not require the defendant to disprove or negate an element of the crime charged. State v.Hage, 595 N.W. 2d 200 (Minn. 1999).

Here, the elements of the crime alleged include that defendant knew or had reason to know the content and character of the pornographic image possessed. In the first instance, the state must prove beyond a reasonable doubt that the sexual image portrayed involved a minor. Once the state has met its burden, the state may impose upon a defendant the burden of proving by a preponderance of the evidence that his conduct should be excused by some mitigating circumstance. If however the mitigating circumstance disproves or negates an element of the crime charged, a defendant cannot be required to shoulder the burden of persuasion for his proffered defense. Shifting this burden

violates due process by requiring the defendant to disprove the existence of an essential element of the crime charged. Affirmative defenses do not violate due process if they involve circumstances of justification, excuse, or alleviation. In those cases, the state must prove each element of the crime and the defendant may prove mitigation or justification of some element.

One case out of the U.S. District Court in Utah specifically held the affirmative defense of the Child Pornography Protection Act (CPPA) permitting proof of subject's adulthood was not improper burden shifting, as argued here by defendant. U.S. v. Pearl, 89 F.Supp. 2d 1237 (D.Utah 2000). This case dealt principally with whether the possession of computer generated images, not involving real minors, could constitutionally be prohibited. The Utah District Court held the CPPA was not overbroad or vague, relying on a First Circuit decision. United States v. Hilton, 167 F.3d 61 (1st Cir. 1999). However, a 9th Circuit decision, Free Speech Coalition v. Reno, 198 F.3d 1083. (9th Cir. 1999), decided the CPPA was unconstitutional in violating the First Amendment. They held Congress did not have authority to make criminal the generation of fictional children engaged in imaginary but explicitly sexual conduct. The 9th Circuit case did not rule on the Constitutionality of the statutory affirmative defense. An 11th Circuit decision sided with the 1st Circuit in upholding the CPPA. United States v. Acheson, 195 F.3d 645 (11th Cir. 1999). The *Free Speech* case is currently pending before the U.S. Supreme Court. Unless this other line of cases is included in the review, there may not be a definitive decision about the affirmative defense claim. The Pearl case found the affirmative defense provided by the CPPA provides an added measure of protection to a defendant. If the person depicted actually was an adult at the time the image was created or a defendant honestly believes that the individual depicted in the image appears to be 18 years old or older and is believed by a jury or who can show

he knew the image was created by having a youthful-looking adult pose for it, must be acquitted, so long as the image was not presented or marketed as if it contained a real minor. What distinguishes the CPPA affirmative defense as discussed in the *Pearl* case, the one created by the Minnesota legislature is that Congress did not make the affirmative defense available to someone accused of unlawful possession. The Minnesota statute's affirmative defense is available to someone accused of unlawfully possessing pornography. In addition, the CPPA provides an affirmative defense which mitigates possession of the pornography. This also distinguishes the federal statute from Minnesota's.

The Wisconsin child pornography statute was ruled unconstitutional because it placed the burden of proof on defendant to show a lack of knowledge of the child victim's age. State v. Zarnke, 589 N.W.2d 370, 374 (Wis. 1999). That statute explicitly allocated to the defendant the burden of proof on the element of age. The Wisconsin lawprovided, " It shall be an affirmative defense if the defendant had reasonable cause to believe the child depicted was 18. Id. at 371. There was no requirement, as in Minnesota, that the state prove the defendant had knowledge of the minority status of the person depicted.

This Court could not find a case precisely on point with the issue raised here, by defendant. A plain reading of the affirmative defense created by the Minnesota legislature shifts the burden of proof to defendant on an essential element of the crime. This shifting of the burden of proof on an essential element of the crime alleged is unconstitutional.

LMM

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

Court File No. K9-01-912

vs.

ORDER

Mark Robert Norlander,
Defendant.

The above-entitled case came on before the undersigned judge on October 3, 2001 at the Dakota County Judicial Center, Hastings, MN for a contested omnibus hearing.

The State was represented by Lawrence Clark, Assistant Dakota County Attorney. The Defendant was present and represented by Jeffrey Dean, Esq.

Based upon the submissions of the parties, arguments by counsel and the court file the court makes the following:

ORDER

1. The Defendant's motion to for dismissal of the complaint is GRANTED.

2. The attached memorandum is hereby incorporated as part of the court's order.

BY THE COURT:

Dated: 12-14-01

_____
Leslie M. Metzen
Judge of District Court

MEMORANDUM

Defendant has filed a motion to dismiss the complaint alleging that Minn. Stat. §617.247, subd. 4 is unconstitutional. He alleges three bases for the unconstitutionality of the statute. First, he argues that the affirmative defense contained in subd. 8 shifts to defendant the burden of proof on an element of the crime. Second, he alleges the statue contains no *mens rea* element. Third, he alleges the statue violates the First Amendment of the United States Constitution.

These issues will be addressed in reverse order. It is well settled that the First Amendment does not extend to protect the use, possession, or dissemination of child pornography. A statute is presumed to be constitutional and will survive an overbreadth challenge unless its overbreadth is both real and substantial. States have an important and legitimate interest in protecting minor victims of child pornography. The potential harm to minors who engage in creating pornographic images may be psychological, physical, and emotional. States are entitled to great leeway in the regulation of pornographic depictions of children. Minnesota's statute is neither over broad nor violative of the First Amendment.

The defendant also alleges the Minnesota statute does not contain a *mens rea* element. Subd. 4 prohibits a person from possessing a pornographic work, **"knowing or with reason to know its content and character."** The plain language of the statute requires the state to prove that the defendant knew or had reason to know that the image possessed involved a sexual performance involving a minor. The term minor is clearly defined and sexual conduct is also clearly defined. For a pornography statute to be constitutional, some level of scienter as to the minority of a child is required. The scienter element of the Minnesota statute requires the defendant to know or have reason to know that the pornographic work in his possession contains a minor engaged in sexual conduct. The state must prove the *mens rea*

element included in the Minnesota statute and the statute is not unconstitutional on that ground.

Defendant additionally alleges Minn. Stat. §617.247 violates both the federal and state Due Process Clause. Subd. 8 provides, "It shall be an affirmative defense to a charge of violating this section that the pornographic work was produced using only persons who were 18 years or older." The Fourteenth Amendment prohibits shifting the burden of proof for an element of the charged offense to the defendant. State v. Niska, 514 N.W. 2d 260 (Minn. 1994). Due process requires the state prove beyond a reasonable doubt the existence of every element of the crime charged. A defendant's due process rights are violated if the burden to disprove the existence of any element of the crime charged is impermissibly shifted to the defendant. Mullane v. Wilbur, 421 U.S. 684 (1975). There are constitutional limits beyond which the states may not go in allocating burdens of proof by labeling as affirmative defenses at least some elements of the crime that have been defined in their statutes. Patterson v. New York, 432 U.S. 197 (1977). Requiring a defendant to bear the burden of persuasion for an affirmative defense is consistent with due process only when doing so does not require the defendant to disprove or negate an element of the crime charged. State v.Hage, 595 N.W. 2d 200 (Minn. 1999).

Here, the elements of the crime alleged include that defendant knew or had reason to know the content and character of the pornographic image possessed. In the first instance, the state must prove beyond a reasonable doubt that the sexual image portrayed involved a minor. Once the state has met its burden, the state may impose upon a defendant the burden of proving by a preponderance of the evidence that his conduct should be excused by some mitigating circumstance. If however the mitigating circumstance disproves or negates an element of the crime charged, a defendant cannot be required to shoulder the burden of persuasion for his proffered defense. Shifting this burden

violates due process by requiring the defendant to disprove the existence of an essential element of the crime charged. Affirmative defenses do not violate due process if they involve circumstances of justification, excuse, or alleviation. In those cases, the state must prove each element of the crime and the defendant may prove mitigation or justification of some element.

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he knew the image was created by having a youthful-looking adult pose for it, must be acquitted, so long as the image was not presented or marketed as if it contained a real minor. What distinguishes the CPPA affirmative defense as discussed in the *Pearl* case, the one created by the Minnesota legislature is that Congress did not make the affirmative defense available to someone accused of unlawful possession. The Minnesota statute's affirmative defense is available to someone accused of unlawfully possessing pornography. In addition, the CPPA provides an affirmative defense which mitigates possession of the pornography. This also distinguishes the federal statute from Minnesota's.

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This Court could not find a case precisely on point with the issue raised here, by defendant. A plain reading of the affirmative defense created by the Minnesota legislature shifts the burden of proof to defendant on an essential element of the crime. This shifting of the burden of proof on an essential element of the crime alleged is unconstitutional.

LMM

No. 02-376

In the
Supreme Court of the United States

BRIAN VICTOR MYRLAND AND
MARK ROBERT NORLANDER,

Petitioners,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

The Respondent hereby objects to the Petitioners' question presented as phrased in their Writ of Certiorari. If review is granted, the question presented is whether the affirmative defense set forth in Minn. Stat. §617.247, subd. 8 violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

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BRIEF IN OPPOSITION

The State of Minnesota ("Respondent") submits its Opposition to the Petition for Writ of Certiorari filed by Petitioners, Brian Victor Myrland and Mark Robert Norlander ("Petitioners") to review the judgment of the Minnesota Court of Appeals. For the reasons set forth herein, the Petition should be denied because there are no compelling reasons for further appellate review.

STATEMENT OF FACTS

A. State v. Myrland.

On May 18, 2001, an official for Minnesota Independent School District 196 reported to Investigator Mike Pritzlaff of the Apple Valley, Minnesota, Police Department that the school district suspected a schoolteacher, identified as Brian Victor Myrland, of downloading and printing pornography off the Internet from his classroom computer. The school district conducted a search of Myrland's classroom. In doing so, school officials found numerous pornographic works of males that appeared to be under 18-years-old. The school district provided to Investigator Pritzlaff, copies of said pornographic works and Pritzlaff began an investigation of the matter.

During interviews with school officials and Investigator Pritzlaff, Myrland admitted that he had been accessing pornographic web sites on his classroom computer and five other computers located in the school. Myrland stated that he would save into computer folders, pictures from the pornographic web sites. Myrland further stated that he would subsequently print some of the pictures and take them home. Myrland admitted that he began accessing the

pornographic web sites during the 1999/2000 school year and continued until the discovery of his activities in May 2001.

The hard drives of the computers identified by Myrland as being the ones he used to access the pornographic web sites were obtained and searched by the Minnesota Bureau of Criminal Apprehension. During the search, numerous images were found of males who appear to be under the age of 18, engaged in sexual conduct.

B. State v. Norlander.

On December 22, 2000, an agent of the St. Paul, Minnesota, Police Department contacted Detective Manila Shaver of the West St. Paul Police Department, to notify him that they were conducting an investigation into efforts by Mark Robert Norlander, a West St. Paul resident, to make contact with minor boys for sexual purposes. Detective Shaver learned that a special agent in the Wisconsin Department of Justice, posing as a 14 year-old boy, had developed in Internet relationship with Norlander. During their numerous Internet communications, Norlander had proposed arranging a meeting with the "boy" to engage in sexual activity. The meeting was set for December 21, 2000, in Eau Claire, Wisconsin. Norlander arrived at the prearranged time and location and was taken into custody and charged by Wisconsin authorities. Based upon the information obtained in the Wisconsin investigation, a search warrant was prepared for Norlander's residence in West St. Paul. The search was executed on December 22, 2000, and officers seized a number of items from Norlander's home, including a computer. When talking with investigators, Norlander admitted that his computer might contain images of minors engaged in sexual activity. When the officers viewed the contents of the hard drive from Norlander's computer,

they found a number of pictures of minor boys engaged in sexual activities.

The Petitioners were separately charged by complaint with one count of Possession of Pictorial Representations of Minors in violation of Minn. Stat. §617.247, subd. 4. The Petitioners moved the trial court to dismiss their respective complaints arguing that the statute was unconstitutional. Specifically, the Petitioners alleged that: (1) the affirmative defense contained in Minn. Stat. §617.247, subd. 8 violated the Due Process Clause of the United States Constitution because it shifts to the defendant, the burden of proof of an essential element of the crime; (2) Minn. Stat. §617.247, subd. 4 contained no *mens rea* element; and (3) Minn. Stat. §617.247, subd. 4 was overbroad and violative of the First Amendment of the United States Constitution.

Contested omnibus hearings were held in each case. By separate orders dated December 14, 2001, the trial court dismissed the complaints in both cases finding that the affirmative defense contained in Minn. Stat. §617.247, subd. 8 violated the Due Process Clause of the United States Constitution by impermissibly shifting to the defendant, the burden of proof of an essential element of the crime. The trial court rejected the Petitioners' remaining constitutional challenges.

The Respondent appealed the trial court's decision to the Minnesota Court of Appeals. In an opinion filed on June 4, 2002, the Minnesota Court of Appeals reversed the trial court's decision. The Petitioners subsequently filed a Petition for Review with the Minnesota Supreme Court. By an order dated August 6, 2002, the Minnesota Supreme Court denied discretionary review.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. THE MINNESOTA COURT OF APPEALS' DECISION IS IN ACCORD WITH LONG STANDING SUPREME COURT AND MINNESOTA SUPREME COURT PRECEDENT.

The Petitioners were separately charged by complaint with one count of Possession of Pictorial Representations of Minors in violation of Minn. Stat. §617.247, subd. 4. That statute provides:

> Subd. 4. Possession prohibited. A person who possesses a pornographic work or a computer disk or computer or other electronic, magnetic, or optical storage system or a storage system of any other type, containing a pornographic work, knowing or with reason to know its content and character, is guilty of a felony and may be sentenced to imprisonment for not more than three years and a fine of not more than $5,000 for a first offense and for not more than five years and a fine of not more than $10,000 for a second or subsequent offense.

Minn. Stat. §617.247, subd. 4. An affirmative defense to the crime is contained in Minn. Stat. §617.247, subd. 8 which provides:

> Subd. 8. Affirmative defense. It shall be an affirmative defense to a charge of violating this section that the pornographic work was

> produced using only persons who were 18 years or older.

Minn. Stat. §617.247, subd. 8.

The Petitioners challenged the constitutionality of Minn. Stat. §617.247, subd. 8 arguing that it violated the Due Process Clause. Specifically, the Petitioners maintained that the affirmative defense shifts to a defendant, the burden of proof of an essential element of the offense; namely, that the defendant must prove that the photographic subjects are adults.

It is well-settled law that due process requires the state to prove, beyond a reasonable doubt, every fact necessary to constitute the crime with which a defendant is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 281 (1977) and Patterson v. New York, 432 U.S. 197, 204, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The law enunciated by this Court in Winship and Patterson was adopted by the Minnesota Supreme Court in a series of cases dating back to 1983. (*See* State v. Charlton, 338 N.W.2d 26 (Minn. 1983), State v. Auchampach, 540 N.W.2d 808 (Minn. 1995), and State v. Hage, 595 N.W.2d 200 (Minn. 1999)).

Once the state has met its burden, the state may impose upon a defendant the burden of proving by a preponderance of the evidence that his conduct should be excused by some mitigating circumstance or issue. Patterson, 432 U.S. at 209. If, however, the mitigating circumstance or issue disproves or negates an element of the crime charged, a defendant cannot be required to shoulder the burden of persuasion for his proffered defense. Patterson, 432 U.S. at 206-8. If a defendant were required to bear this burden, it would violate due process by impermissibly shifting to the defendant the burden of disproving the existence of an

element of the crime charged. Id. The Minnesota Supreme Court has held that, "if the mitigating circumstance or issue disproves or negates an element of the crime charged, the greatest burden a state may impose upon a defendant is that of shouldering the burden of production." Hage, 595 N.W.2d at 205. "In such cases, a defendant must make a prima facie showing that the proffered defense is an issue in the case, with the burden then shifting back to the state to prove beyond a reasonable doubt the lack of the defense." Id., citing Auchampach, 540 N.W.2d at 817 (citing State v. Charlton, 338 N.W.2d 26, 30-31 (Minn. 1983)); 1 LaFave & Scott, Substantive Criminal Law §1.8(b), at 68-71.

Here, a plain reading of the applicable statutes demonstrates that Minn. Stat. §617.247, subd. 8 does not violate the Due Process Clause of the United States Constitution. Minn. Stat. §617.247, subd. 4 prohibits a person from possessing a "pornographic work" or any computer component containing a "pornographic work," knowing or with reason to know it's content and character. The term "pornographic work" is defined as follows:

> (1) an original or reproduction of a picture, film, photograph, negative, slide, videotape, videodisc, or drawing of a sexual performance involving a minor; or
>
> (2) any visual depiction, including any photograph, film, video, picture, drawing, negative, slide, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means that:
>
> > (i) uses a minor to depict actual or simulated sexual conduct;

> (ii) has been created, adapted, or modified to appear that an identifiable minor is engaging in sexual conduct; or
>
> (iii) is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexual conduct.
>
> For the purpose of this paragraph, an identifiable minor is a person who was a minor at the time the depiction was created or altered, whose image is used to create the visual depiction.

Minn. Stat. §617.246, subd. 1(f). The term "minor" means any person under the age of 18. Minn. Stat. §617.246, subd. 1(b).

Relying upon long standing precedent, the Minnesota Court of Appeals correctly held that the state has the burden of proving, as part of its case in chief, that the subject depicted in the pornography is a minor. Furthermore, the Minnesota Court of Appeals correctly held that even if the defense is asserted, the defendant would only be required to make a prima facie showing that the age of the person is an issue in the case, after which, the burden would shift back to the state to prove beyond a reasonable doubt the lack of the defense. In other words, a defendant only has the burden of production rather than the burden of persuasion if he wishes to assert the affirmative defense contained in Minn. Stat. §617.247, subd. 8.

The Petitioners assert that a defendant should never be required to shoulder the burden of production on an

affirmative defense, arguing that it violates the Due Process Clause. The Petitioners cite no applicable case law in support of their position. If the Petitioners' argument were adopted, all affirmative defenses would violate the Due Process Clause. The Petitioners' reasoning is in direct conflict with this Court's holdings in Winship and Patterson.

Rather than shift the burden of an element of the offense to the defendant, the affirmative defense aids the defendant by limiting the reach of the statute. For example, there may be a situation in which the defendant produced what appears to be pornographic work using adults made to look as if they are minors. If the defendant was charged under Minn. Stat. §617.246 for using minors to produce a pornographic work, he would have available to him, the affirmative defense that he used individuals 18 years or older to produce the work. *See* Minn. Stat. §617.246, subd. 6. Likewise, if the same defendant was charged with possessing the same alleged pornographic work under Minn. Stat. §617.247, subd. 4, he would still have the affirmative defense available to him. *See* Minn. Stat. §617.247, subd. 8. If the affirmative defense did not exist for the possession charge, an anomaly would be created under the above set of facts.

The decision issued by the Minnesota Court of Appeals comports with Winship, its progenies, and Minnesota case law. As such, there is no compelling reason for further appellate review.

II. THE MINNESOTA COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH ASHCROFT V. FREE SPEECH COALITION.

In support of their Writ of Certiorari and affirmative defense argument, the Petitioners suggest that the decision

issued by the Minnesota Court of Appeals is in conflict with this Court's holding in Ashcroft v. Free Speech Coalition, 535 U.S. ____, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). In Free Speech Coalition, this Court struck down the elements of the federal Child Pornography Protection Act that criminalized the possession, distribution or creation of "virtual" child pornography. This Court held that the portions of the statute criminalizing "virtual" child pornography violated the First Amendment as being overbroad.

In their Writ of Certiorari, the Petitioners misrepresent this Court's holding in Free Speech Coalition by suggesting that this Court held that it was unconstitutional to include an affirmative defense in the federal child pornography statute. The Petitioners quoted partial language from the decision in which this Court responded to an argument made by the Government. The Government argued that the statute did not violate the First Amendment because of the existence of an affirmative defense that allows a defendant to avoid conviction for nonpossession offenses by showing that the materials were produced using only adults and were not otherwise distributed in a manner conveying the impression that they depicted real children. The Petitioners cited the following language from the Free Speech Coalition opinion:

> The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful. An affirmative defense applies only after prosecution has begun, and the speaker must himself prove, on pain of a felony conviction, that his conduct falls within the affirmative defense. In cases under the CPPA, the evidentiary burden is not trivial. Where the defendant is not the producer of the work, he may have no way of establishing the

> identity, or even the existence, of the actors. If the evidentiary issue is a serious problem for the Government, as it asserts, it will be at least as difficult for the innocent possessor. The statute, moreover, applies to work created before 1996, and the producers themselves may not have preserved the records necessary to meet the burden of proof. Failure to establish the defense can lead to a felony conviction.

Free Speech Coalition, 122 S.Ct. at 1404.

This Court, however, went on to state:

> We need not decide, however, whether the Government could impose this burden on a speaker. Even if an affirmative defense can save a statute from First Amendment challenge, here the defense is incomplete and insufficient, even on its own terms. It allows persons to be convicted in some instances where they can prove children were not exploited in the production. A defendant charged with possessing, as opposed to distributing, proscribed works may not defend on the ground that the film depicts only adult actors. So while the affirmative defense may protect a movie producer from prosecution for the act of distribution, that same producer, and all other persons in the subsequent distribution chain, could be liable for possessing the prohibited work. Furthermore, the affirmative defense provides no protection to persons who produce speech by using computer imaging, or through other means that do not involve the

> use of adult actors who appear to be minors. In these cases, the defendant can demonstrate no children were harmed in producing the images, yet the affirmative defense would not bar the prosecution. For this reason, the affirmative defense cannot save the statute, for it leaves unprotected a substantial amount of speech not tied to the Government's interest in distinguishing images produced using real children from virtual ones.

Free Speech Coalition, 122 S.Ct. at 1405.

The Free Speech Coalition case does not prohibit the inclusion of affirmative defenses in child pornography statutes. As noted by Justice Thomas in his concurring opinion, the Court left "open the possibility that a more complete affirmative defense could save a statute's constitutionality. . . ." Free Speech Coalition, 122 S.Ct. at 1407. In fact, in his concurrence, Justice Thomas stated that in the event technology evolves "to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children," then "the Government should not be foreclosed from enacting a regulation of virtual child pornography that contains an appropriate affirmative defense or some other narrowly drawn restriction." Free Speech Coalition, 122 S.Ct. at 1406. Contrary to the Petitioners' argument, the Free Speech Coalition decision actually supports the inclusion of the affirmative defense to possession of child pornography offenses contained in Minn. Stat. §617.247, subd. 8.

The Petitioners misrepresented the holding in Free Speech Coalition. The holding in that case only addressed First Amendment overbreadth issues concerning the elements

of the federal Child Pornography Protection Act that criminalized "virtual" child pornography. The Free Speech Coalition case has no applicability to the issue presented in the case at hand.

CONCLUSION

The Petitioners have failed to set forth any compelling reasons for further appellate review. Based on the foregoing, Respondent respectfully prays that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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In the
Supreme Court of the United States

BRIAN VICTOR MYRLAND AND
MARK ROBERT NORLANDER,

Petitioners,

v.

STATE OF MINNESOTA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF MINNESOTA COURT OF APPEALS

PETITIONERS' REPLY BRIEF

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STATEMENT

This reply brief is submitted to address new points raised by the Respondent.

ARGUMENT

I. RESPONDENT INCORRECTLY ASSERTS THAT THE ADOPTION OF PETITIONERS' ARGUMENTS WILL INVALIDATE ALL AFFIRMATIVE DEFENSES.

Respondent mistakenly claims that "Petitioners assert that a defendant should never be required to shoulder the burden of production on an affirmative defense, arguing that it violates the Due Process Clause. The Petitioner's cite no applicable case law in support of their position. If the Petitioner's arguments were adopted, all affirmative defenses would violate the Due Process Clause." (Respondent's Brief in Opposition to Writ of Certiorari, p, 7-8)

Respondent misstates Petitioners' argument. Petitioners argue that the burden of production may not be shifted to the defendant on an *element* of the crime by labeling the element an affirmative defense. An affirmative defense may require the defendant to carry that burden when the affirmative defense *collaterally negates* the element. Respondent fails to distinguish between affirmative defenses, which incidentally negate elements, from the affirmative defense in the present case, which shifts the burden on the element itself. In other words, using Respondent's reasoning, there would be no constitutional distinction between an

affirmative defense that requires a murder defendant to make a prima facie case disproving the element of intent to kill, and an affirmative defense that requires a murder defendant to make a prima facie case of duress, which collaterally disproves the element of intent to kill.

Respondent engages in the same faulty analysis followed by the court of appeals and misstates the issue from the cases cited. Respondent cites the following language from a series of cases for the proposition that the burden of production may be shifted to the defendant on an *element* of the crime: "if the mitigating circumstance or issue [contained in the affirmative defense] disproves or negates an element of the crime charged, the greatest burden a state may impose upon a defendant is that of shouldering the burden of production." (Respondent's Brief, p. 5, 6)

The issue in the cited cases was not whether the burden of production could be shifted on an element of the crime; in the cited cases the respective affirmative defense did not shift the burden on an element. Instead, the respective affirmative defense offered the defendant an *excuse* to the crime charged, which happened to negate an element. Thus, the issue in the cited cases was the determination of whether the respective affirmative defense, which excused the crime (i.e., duress, necessity), allocated the burden of production or of persuasion *after* the state met its burden of production and of persuasion on the elements. Respondent's analysis is faulty because it equates the affirmative defenses in the cited cases, which offer the defendant an excuse to the crime and which have the collateral effect of negating an element, with the affirmative defense in the present case, which requires proof on the element itself. (See also Petitioner's Petition for Writ of Certiorari, p. 12, section III)

Contrary to Respondent's assertion, the adoption of Petitioners' argument will not invalidate all affirmative defenses. Respondent has misstated Petitioners' argument.[1]

II. THE AFFIRMATIVE DEFENSE IN QUESTION MANDATES THAT THE DEFENDANT CARRY THE BURDEN OF PRODUCTION ON AN ESSENTIAL ELEMENT OF THE CRIME, IT DOES NOT EXIST TO LIMIT THE STATUTE AND AID THE DEFENDANT.

Respondent incorrectly asserts that: "Rather than shift the burden of an element of the offense to the defendant, the affirmative defense aids the defendant by limiting the reach of the statute." (Respondent's brief, p. 8)

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[1] Respondent has also misstated Petitioners' observations concerning Ashcroft v. Free Speech Coalition, 535 U.S.___, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002). Respondent asserts that Petitioners misrepresented this Court's holding to this Court by "suggesting that this Court held that it was unconstitutional to include an affirmative defense in the federal child pornography statute." (Respondent's Brief, p.9) This is incorrect. Petitioners explicitly stated that the holding in that case was based on First Amendment grounds, and that the burden-shifting was a "concern" to this Court. (Petition, p. 8, n. 1) This Court wrote "the government would have us read the CPPA not as a measure suppressing speech but as a law shifting the burden to the accused [via its affirmative defense] to prove the speech is lawful." Expressing its concern, the Court stated "The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful...." 122 S.Ct. at 1404-05. While this Court did not issue its decision in that case based on the constitutionality of the burden-shifting affirmative defense, clearly this Court's concern about the burden-shifting is pertinent to the present case.

By making this new point, Respondent is ignoring the Minnesota Court of Appeals' construction of the statute. The statute, as construed by the Minnesota Court of Appeals, "imposes on defendants the burden of production regarding the age of the persons in the pornographic work [and] ...requires respondents to make a prima facie showing that the age of the persons involved is a disputed issue." State v. Myrland, 644 N.W.2d 847, 851 (Minn.Ct.App. 2002) (App. A-3, A-8).[2] Because the court of appeals squarely held that the statute shifts the burden of production to the defendant on an essential element of the crime, the only question for this Court is whether due process and the presumption of innocence allow for a defendant to be presumed guilty until the defendant presents the threshold amount of evidence necessary to make the required prima facie case, satisfy his burden of production, and avoid a directed verdict against him on that element.[3]

Finally, Respondent states that the state has the burden of proving, as part of its case in chief, that the subject depicted in the pornography is a minor. (Respondent's brief, p. 7) This obscures the issue. According to the court of

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[2] The court of appeals also confirmed that the age of the persons in the pornographic work is an essential element of the crime. 644 N.W.2d 847 at 851, (App. A-8).

[3] Respondent suggests that Petitioners' arguments below focused on the constitutionality of shifting the burden of persuasion. (Respondent's brief, p. 5) In fact, Petitioners argued extensively (to the district court, the court of appeals, and to the state supreme court in the petition for review) that the statute violates due process regardless of whether it shifts the burden of production or the burden of persuasion.

appeal's interpretation of the statute, the state will only have this burden of persuasion when and if the defendant first satisfies his burden of production showing that age is at issue. Again, the question for this Court is whether that is constitutional.

CONCLUSION

In view of the direct conflict of the decision below with past decisions of this Court, and because the decision below is contrary to the law in every jurisdiction of the United States, and is clearly erroneous, Petitioners respectfully request that their petition for a writ of certiorari to the Minnesota Court of Appeals be granted.

Respectfully submitted,

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